No. 83-245

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF APPELLANT, PENSION BENEFIT GUARANTY CORPORATION

GERALD M. FEDER *
NIK B. EDES
FEDER & EDES
1527 - 18th Street, N.W.
Washington, D.C. 20036
(202) 387-1515
Attorneys for Amicus Curiae National Coordinating Committee for Multiemployer Plans

* (Counsel of Record)

Of Counsel:

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

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The National Coordinating Committee for Multiemployer Plans submits this brief *amicus curiae* in support of Appellant. Copies of letters written by counsel for Appellant and Appellee granting the parties consent to this submission are on file with the Clerk of the Court.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The National Coordinating Committee for Multiemployer Plans ("NCCMP"), pursuant to the written consent of the parties, submits this brief to urge reversal of the decision of the Court of Appeals below holding that

the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA")[1] are unconstitutional to the extent Congress provided that they affect transactions occurring prior to the date of enactment. The NCCMP is a tax-exempt, nonprofit corporation organized to represent the interests of the more than eight million workers who participate in collectively-bargained multiemployer plans. The NCCMP's affiliates include over 140 multiemployer plans and related international unions. Its affiliates together represent the great majority of the participants in multiemployer plans.

The NCCMP actively participated throughout the development and Congressional consideration of the MPPAA. It is our belief that such legislation, including the provisions challenged here, is essential to the stability of multiemployer pension plans and to the viability of the federal pension benefit guaranty program established by Title IV of ERISA. During the period between the Congressionally mandated effective date of MPPAA and the date of the law's enactment, numerous employers who had agreed to contribute to multiemployer pension plans terminated their affiliation and withdrew from such plans. A large number of these employers have filed lawsuits challenging the constitutionality of MPPAA's retroactivity in an attempt to avoid the financial liability which they incurred under MPPAA for withdrawing from those plans. The liability of the withdrawn employers who have filed suit is substantial, amounting to almost 65 million dollars. Should the Ninth Circuit's decision be permitted to stand, the result will be to transfer that liability to employers who are still contributing to plans. Moreover, if the remaining employers cannot fund

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[1] Pub. L. No. 96-364, 94 Stat. 1208, *et seq.* (1980). The withdrawal liability provisions of the MPPAA, which added Sections 4201 through 4225 to Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), are codified at 29 U.S.C. §§ 1381-1405.

the liability, the result will be to disrupt severely the operation of such plans and endanger the retirement security of the millions of American workers who participate in them.

In view of applicable page limitations, our *amicus* brief will be confined to one legal issue—whether the retroactive withdrawal liability provisions of MPPAA violate the Due Process Clause. We rely upon the brief of the Pension Benefit Guaranty Corporation ("PBGC") for the factual statement of this case and a detailed description of the relevant legislation.

SUMMARY OF ARGUMENT

The Ninth Circuit has declared MPPAA's retroactive withdrawal liability provisions unconstitutional under the Due Process Clause on the grounds that they modify existing obligations of the parties under their collective bargaining and trust agreements. The Court is thereby invited to ignore its own well settled view that legislation readjusting economic rights and burdens is not unconstitutional merely because it upsets established expectations and imposes a new duty or liability on past acts. The essential test must involve an assessment of whether the Congress acted in an arbitrary and irrational fashion.

Far from acting arbitrarily, Congress was scrupulous in fashioning a liability which withstands the "rational basis" test. ERISA was adopted for the purpose of fostering the financial soundness of private pension plans. Yet, within a few years of the law's enactment, it became clear that this policy was in jeopardy insofar as it applied to multiemployer plans. The financial crisis facing these plans was carefully analyzed by the PBGC two years before MPPAA was finally adopted; these deep-rooted problems were attested to by numerous concerned witnesses representing the Administration, employers and unions during hearings before four Congressional Committees.

The facts were well-established that the vast majority of employers could withdraw from a multiemployer plan with no further responsibility for funding the benefit obligations they had left behind. The pensions promised to plan participants who had worked for a withdrawn employer must still be honored, but it was the remaining employers who were forced to continue contributing and complete the funding of those benefits. Moreover, once a plan got into financial difficulty, the 1974 law encouraged those remaining employers to "rush for the door" in the hope of escaping liability that would be triggered by the plan's future termination. Thus, in view of the problems disclosed by an extensive legislative record, Congress found it essential to eliminate the incentives for employers to withdraw from multiemployer plans and abdicate to others the burden of funding the plans' promised benefits.

There can be no doubt that the retroactivity provisions of the statute are constitutional, especially when they are evaluated in the context of the factors pertinent to meeting a due process challenge. In considering the reliance interests and equities with respect to the affected parties, it cannot be said that employers who withdrew before enactment were taken by surprise; the legislative debate was open and vigorous and the bill had contained a retroactive feature from the first day of its introduction. Moreover, it was not only withdrawn employers who had an interest in the law. Multiemployer plans, their participants and beneficiaries, and employers who continued to contribute, all had a heavy stake in preserving the financial integrity of their plans.

Nor is this an area which was regulated for the first time with the development and enactment of MPPAA. The original 1974 law was clearly intended to be experimental as it affected multiemployer plan terminations. And, the fact is that pension plans had been the subject

of changing federal regulation for more than three decades prior to the enactment of MPPAA in 1980.

At least as significant are the numerous moderating features of the statute designed to assure that liability was imposed only to the extent necessary to achieve MPPAA's legislative purpose. Congress was scrupulous to take into account those situations where withdrawal liability could be justifiably mitigated in whole or in part. Numerous such moderating provisions were adopted throughout MPPAA's legislative scheme and made applicable to both pre- and post-enactment withdrawals. Moreover, the retroactive application date was itself reduced because of Congress' view that the original effective date extended too far in the past and could be limited to a narrower time frame while still serving its intended goal.

This Court has acted numerous times to reaffirm the constitutionality of retroactive legislation when it found that Congress, as here, acted rationally and with due care. Accordingly, the decision of the Ninth Circuit should be reversed.

ARGUMENT

THE WITHDRAWAL LIABILITY PROVISIONS OF MPPAA APPLIED RETROACTIVELY ARE ESSENTIAL TO THE STABILITY OF MULTIEMPLOYER PLANS AND THE VIABILITY OF THE FEDERAL BENEFIT GUARANTY PROGRAM, AND THEIR ADOPTION AS PART OF A COMPREHENSIVE MEASURE TO FOSTER THOSE OBJECTIVES WAS NEITHER ARBITRARY NOR IRRATIONAL.

The Ninth Circuit has declared unconstitutional MPPAA's retroactive withdrawal liability provisions under the Due Process clause on the grounds that such provisions modify existing obligations of the parties pursuant to their collective bargaining and trust agreements. But, it is now well-settled that legislation readjusting

economic rights and burdens is not unconstitutional simply because it upsets established expectations. This is true even though the effect of the legislation is to impose a new duty or liability on past acts. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) and cases cited therein. Indeed, "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." 428 U.S. at 15. Thus, the issue for the Court is to assess the rationality of the retroactive effects as a means of achieving the Congressional purpose.

In *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359 (1980), the court concluded that such an assessment can be made "by a comparison of the problem to be remedied with the nature and scope of the burden imposed to remedy that problem." 592 F.2d at 960. The court also synthesized the pertinent factors to an evaluation of that burden, factors which were largely derived from prior decisions of this Court. Accordingly, in deciding questions of unconstitutionality, the Court has carefully considered four principal elements: the reliance interest of the parties affected, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245-247 (1978); whether the impairment of the private interest is affected in an area previously regulated by statute, *Veix v. Sixth Ward Bldg. & Loan Asso. of Newark*, 310 U.S. 32 (1940), *Federal Housing Administration v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958); the equities of imposing the liability, *Turner Elkhorn*, 428 U.S. at 19; and the extent to which statutory provisions have been included which limit or moderate the impact of the burden, *W. B. Worthen Co. v. Thomas*, 292 U.S. 426, 434 (1934), *Allied Structural Steel*, 438 U.S. at 250.

Examination of "the problem to be remedied" demonstrates beyond doubt that withdrawal liability, as applied retroactively, is an essential part of that remedy. Far from acting arbitrarily, Congress was scrupulous in

fashioning a liability which withstands the "rational basis" test.

A. The Stability of Multiemployer Plans and the Viability of the Federal Benefit Guaranty Program Was Threatened By the Incentives for Withdrawal and Plan Termination Created by ERISA's Original Title IV Provisions.

1. *The Vulnerability of Multiemployer Plans and the Federal Guaranty Program.*

ERISA's enactment in 1974 established a national public policy to foster the financial soundness of private pension plans and to safeguard the benefits earned by participants in such plans. *See*, 29 U.S.C. § 1001. Within a few years of ERISA's adoption, however, it had become clear that this policy was in serious jeopardy insofar as multiemployer plans and their eight million participants were concerned.

The financial crisis facing multiemployer plans was analyzed in a comprehensive report submitted to Congress by the PBGC in 1978 (the "PBGC Multiemployer Study")[2] and by numerous witnesses appearing during Congressional hearings. Moreover, the provisions eventually enacted were the subject of extensive deliberations by four separate Congressional committees, committee reports and floor debates. The extensive legislative record left no doubt that the economic stability of multiemployer plans was in danger and that the benefit guaranty pro-

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[2] **The PBGC Multiemployer Study was submitted on July 1, 1978, pursuant to Congress' direction the previous year that the agency prepare a report concerning the anticipated condition of the multiemployer program. Pub. L. No. 95-214, 91 Stat. 1501 (1977). Following submission of that Study, the Administration, on May 3, 1979, sent to Congress its legislative proposals for restructuring the multiemployer program. Those proposals served as the basis for Congressional hearings and floor debates during 1979 and 1980.**

gram for multiemployer plans was headed for financial disaster.[3]

A basic element of the problem was the fact that the vast majority of employers could withdraw from a multiemployer plan with no further responsibility for funding the benefit obligations left behind, unless the plan terminated within five years of such withdrawal. The pensions promised to those participants who had worked for a withdrawn employer must be still honored, but it is the remaining employers who continue to contribute and complete the funding of those benefits.

Where employer withdrawals thrust sharply increased funding requirements on the remaining contributors, the effect would have been to drive out still more employers and discourage the entry of new contributors whose participation might otherwise have helped relieve the plan's funding burdens. As discussed below, the PBGC Multiemployer Study reported that this process of employer withdrawal and escalating funding costs to the remaining employers had already imperiled a number of multiemployer plans, and the threat to others was becoming increasingly apparent.

Accordingly, in presenting the Administration's legislative proposals to Congress, the Secretary of Labor, who is the Chairman of PBGC's Board of Directors, identified employer withdrawals and the resulting increased burden on remaining employers as the "key prob-

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[3] While the guaranty program was made immediately effective for single employer plans in 1974, the effective date for multiemployer plans was delayed until January 1, 1978, due to Congress' acknowledged uncertainty regarding the viability of this program for such plans. The 1978 effective date for the mandatory guaranty program was postponed on several successive occasions in order to provide time for the preparation and Congressional consideration of the PBGC Multiemployer Study and subsequent legislative proposals. *See*, *Peick v. Pension Benefit Guaranty Corporation* ("*Peick*"), 539 F. Supp. 1025, 1030-38 (N.D. Ill. 1982).

lem" of multiemployer plans.[4] Congress obviously agreed, expressly finding that:

> [w]ithdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries . . . [29 U.S.C. § 1001a(a)(4)(A)]

The PBGC Multiemployer Study also warned that the existing employer liability provisions of Title IV were fundamentally flawed insofar as they applied to multiemployer plans. Not only would these provisions fail to support the viability of the guaranty program, but they could seriously undermine it by encouraging the problem of employer withdrawals and the termination of plans which might otherwise continue in operation.[5]

Under the original Title IV provisions a withdrawing employer would be absolved of any liability even if the plan should later terminate—so long as the employer withdrew at least five years before termination. On the other hand, employers who continued to participate in a plan that ultimately terminated would be subject to liability to the PBGC.[6] Thus, once a plan got into finan-

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[4] *Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Labor and Human Resources, United States Senate*, 96th Cong., 1st Sess. 123 (1979). These hearings are hereafter cited as "Senate Labor Committee Hearings."

[5] PBGC Multiemployer Study pp. 23-24; *see also* H.R. Rep. No. 889, Part I, 96th Cong., 2d Sess. 54-55 (1980).

[6] As enacted in 1974, ERISA provided that if a multiemployer plan terminated with insufficient assets to provide benefits at the level guaranteed by the PBGC, the insufficiency would be assessed against employers who had contributed during the five years preceding termination. The insufficiency was to be allocated among those employers on the basis of each employer's proportionate share of the total contributions required under the plan during the five-year period. Thus, the earlier within that five-year period that any employer withdrew, the less would be its proportionate share of

cial difficulty, the 1974 law would prompt contributing employers to "rush for the door" in the hope of escaping liability that would be triggered by the plan's potential future termination. The result, of course, would only be to hasten that plan's termination.[7] Moreover, employers who continued funding the plan would be punished while those who failed to continue to fund promised benefits were simply let off the hook.

The PBGC Multiemployer Study also pointed to another unfortunate incentive provided by the original employer liability rules. Since, upon plan termination, the liability of even those employers who remained in the plan could not exceed 30 percent of their net worth, there would be many occasions in which employers would find plan termination to be less expensive than the continuing obligation to make contributions. The fact that many multiemplyer plans are established in service-oriented industries where employers can often operate with relatively low net worth, made this a very real prospect. Moreover, while active employees and their unions would normally be expected to resist employer pressure to terminate a plan, the knowledge that the PBGC would guarantee substantially all of the benefits earned by retirees could neutralize that resistance—particularly if the result were to free up contribution payments which could then be used to fund higher benefits for current workers.[8]

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total contributions, and therefore, its liability to the PBGC. The Act further provided that an employer's liability would in no event be greater than 30 percent of its net worth. *See*, 29 U.S.C. §§ 1362-1364.

[7] *See* H.R. Rep. No. 869, Part II, 96th Cong., 2d Sess. 15 (1980); 126 Cong. Rec. S10098 (daily ed., July 29, 1980) (Remarks of Senator Williams); 126 Cong. Rec. S10113-14 (daily ed., July 29, 1980) (Joint Explanation of S. 1076).

[8] *See* PBGC Multiemployer Study, pp. 22-23; Statement of National Coordinating Committee for Multiemployer Plans; Senate Labor Committee Hearings, at 190; 126 Cong. Rec. H3948 (daily ed., May 21, 1980) (Remarks of Congressman Thompson).

According to the PBGC's Multiemployer Study, a number of plans were already in serious financial difficulty due to the fact that withdrawing employers had left behind large liabilities which remaining contributors could ill afford to fund. Many of these plans were in industries where such factors as technological advances, foreign competition and changes in consumption patterns had resulted in protracted declines in the number of contributing employers.[9] Were the benefit guaranty program to go into full effect as originally structured, it was clear that significant numbers of those plans would terminate, with the potential of shifting large, uncontrolled costs onto the insurance program. Such costs would have to be borne by other multiemployer plans through the payment of drastically increased premiums; those increased premiums would add financial burdens which in turn would make it more difficult for other plans to continue operations.[10]

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[9] In addition to the analysis provided by the PBGC Multiemployer Study, the difficulties faced by plans in declining industries was discussed at length in the Congressional reports and debates. *See, e.g.*, H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 63 (1980); 126 Cong. Rec. H3948 (daily ed., May 21, 1980) (Remarks of Congressman Thompson); 126 Cong. Rec. S10098 (daily ed., July 29, 1980) (Remarks of Senator Williams); 126 Cong. Rec. S10113-14 (daily ed., July 29, 1980) (Joint Explanation of S. 1076).

[10] The PBGC Multiemployer Study concluded that multiemployer plans covering 1.3 million workers (15 percent of all multiemployer plan participants) were experiencing financial difficulties that could lead to plan termination before 1988. The cost to the guaranty program system of such terminations was estimated to be $4.8 billion. Taking into account only those plans whose insolvency during that period was definitely projected, it was estimated that the guaranty program system would incur costs of approximately $560 million. PBGC Multiemployer Study, pp. 2, 15-16, 139-40. As the *Peick* court noted, these projections were based solely on economic data and statistical analyses and did not take into account the additional incentives to terminate that ERISA's original employer liability provisions might provide." 539 F. Supp. at 1031. The Congress also concluded that it was necessary to ensure that presently

In view of the problems disclosed by an extensive legislative record, Congress understandably found it essential to eliminate the incentives for employers to withdraw from multiemployer plans and leave others with the burden of funding the benefit obligations they left behind. To accomplish this and other objectives critical to the health and preservation of multiemployer plans it was clear that a substantial revision of existing law was required.

2. *Confirmation of the Threat to Multiemployer Plans and the Federal Guaranty Program by Representatives of Employers, Labor Unions and Covered Plans.*

Congress was not simply responding to "speculative" predictions of the PBGC Multiemployer Study. The likelihood of multiemployer plan terminations is amply demonstrated by MPPAA's legislative history.[11] Throughout the Congressional hearings and subsequent legislative process it was clear that representatives of affected employers, labor unions and multiemployer plans were widely agreed on the danger to multiemployer plans and the Federal guaranty program, absent a major restruc-

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healthy plans would continue to accumulate sufficient assets to pay their benefit commitments. *Id.* at 1046, n. 41.

[11] It is true that there were relatively few multiemployer plans that had as yet terminated when Congress acted on this legislation. However, the fact is that multiemployer pension plans saw their greatest expansion during the 1950's and 1960's; it was some years before certain industries in which these plans had initially flourished began to decline and before the number of retirees reached levels that became burdensome for the plans in such industries. Prior to ERISA, moreover, financially troubled multiemployer plans were able to cope with their difficulties by such means as deferral of funding, reduction of previously-earned benefits, and the adoption of more stringent vesting and eligibility rules. Once ERISA foreclosed these options, the financial plight of such plans became more apparent. *See* PGBC Multiemployer Study, p. 4; and H.R. Rep. No. 869, Part I, 96th Cong., 2d Sess. 54 (1980).

turing of the current law.[12] A number of these groups, including the NCCMP, participated in the hearings held by four Congressional committees, and went on record concerning the need for legislative action.

The urgent need for Congressional action was demonstrated by the extensive analysis presented by the NCCMP,[13] which substantiated the PBGC's conclusions. Equally significant, these legislative imperatives were attested to by the ERISA Industry Committee, an association of some 100 major corporations sponsoring both single employer and multiemployer plans:

> We believe such legislation is essential. Under present law the [PBGC] multiemployer fund faces the prospect of several billion dollars of deficiency within the early years of automatic coverage. The unintended consequence of present law would surely go against every principle already identified; it would accept, and indeed encourage and reward termination of multiemployer plans, it would drive up premiums enormously, and thereby force more plan terminations, and shrink the premium base; and that, in turn, would inevitably require some form of passing the unmet costs of multiemployer plan insurance to others outside the multiemployer plan universe . . . .[14]

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[12] There were repeated references throughout the legislative process to what Congressman Thompson described as "the support of a broad coalition of labor and management groups representing workers and employers in the industries in which multiemployer plans predominate." 126 Cong. Rec. H3947 (daily ed., May 21, 1980). *See also* H.R. Rep. 869, Part I, 96th Cong., 2d Sess., 63; and Remarks of Senator Williams, 126 Cong. Rec. S10098 (daily ed., July 29, 1980). Senator Javits, another sponsor of the legislation, cited a list of organizations which were supportive of the provisions Congress was about to adopt. 126 Cong. Rec. S10100 (daily ed., July 29, 1980).

[13] Senate Labor Committee Hearings, pp. 164-227.

[14] *The Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Ways and Means, House of*

Such testimony from employers and unions most affected by both then-current law and proposed changes compellingly confirmed for Congress the conclusion that legislative change was critical.[15] This is particularly true since support for proposed changes included employer representatives who do not normally welcome legislation imposing new burdens and who, in other legislative contexts, are frequently in opposition to the labor supporters of this measure.

B. No Practical Alternatives Existed to the Adoption of Withdrawal Liability as Part of Congress' Comprehensive Effort to Overcome the Problems Facing Multiemployer Plans and the Federal Guaranty Program.

The legislation fashioned through three years of study by the PBGC and intensive consideration by Congress represents a painstaking effort to treat, in a comprehensive and balanced fashion, the various factors which

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Representatives, 96th Cong., 2d Sess. 104 (1980). For testimony of other witnesses from industries in which multiemployer plans are prevalent, *see, e.g.*, Senate Labor Committee Hearings at 462 (United Mineworkers of America), at 506 (United Food and Commercial Workers), at 594 (Bituminous Coal Operators Association). *The Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Committee on Ways and Means, House of Representatives*, 96th Cong., 2d Sess. (1980), at 89 (Master Contracting Stevedore Association of the Pacific Coast), at 93 (Food Marketing Institute), at 132 (National Construction Employers Council). Each of these employer and labor organizations advocated legislative change and supported the general approach of the PBGC proposals.

[15] This is not to suggest that each witness supported all of the Administration's proposals. When Congressional committee hearings were held on those proposals a number of witnesses, while supporting their basic thrust, nonetheless urged various modifications to eliminate potential inequities or to make them more workable. Consideration of such modifications engaged much of the subsequent legislative process, resulting in a final product which had the endorsement of the organizations listed by Senator Javits, n. 13 at 13, *supra*. *See*, *Peick*, 539 F. Supp. at 1052, n. 62.

threatened the stability of multiemployer plans and the viability of the federal guaranty program.[16] Those provisions, described in detail in the District Court's opinion in *Peick, supra,* demonstrate the statutory purpose to promote continuation, rather than termination, of multiemployer plans by providing for their improved funding, and for the elimination of incentives that encourage employer withdrawal and foster plan decline.

In the process, Congress "spread the pain around", as the *Peick* court so aptly concluded. 539 F. Supp. at 1052. Employers who continue to contribute when others withdraw from a plan are relieved of some of the burden of funding the debt of withdrawn employers, a burden with which they had been saddled in the past. While MPPAA shifted a significant part of that burden to withdrawn employers, a portion of the "pain" was also allocated to employee participants who now face lower guarantees and the possibility of benefit reductions if their plans are in trouble. And the entire universe of multiemployer plans will pay, through higher premiums, to support the PBGC's financial guaranty program, designed to enable insolvent plans to continue operating.

The concept of withdrawal liability is an integral feature of this comprehensive measure. Its adoption was inevitable considering the problems Congress was endeavoring to resolve. Withdrawal liability is the only remedy which can both reduce an employer's incentive to withdraw from a multiemployer plan and make the plan whole when withdrawal nonetheless occurs. It removes from remaining employers the inequitable burden of having to fund the obligations left behind by others,

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[16] This Court, noting the Congressional finding respecting the adverse effects of employer withdrawals, has described MPPAA as an effort "to strengthen the funding requirements and enhance the financial stability of multiemployer pension plans"—thereby implementing "express congressional policy favoring multiemployer trusts." *N.L.R.B. v. Amax Coal Co.,* 453 U.S. 322, 338, n. 22 (1981).

and thereby relieves concerns of such employers about staying with a plan from which others have departed. It is the one remedy which most effectively protects a plan from the economic consequences of a declining contribution base, and most effectively inhibits those processes which can lead to a plan becoming a burden on the PBGC insurance system.

Most remarkable about the lengthy legislative process that led to MPPAA's adoption is that no alternative—other than scrapping the benefit guaranty program for multiemployer plans entirely—was ever seriously suggested. It is this lack of any realistic alternative that explains the support not only of the Administration, but also of both employer and labor groups; they all recognized the critical deficiencies of the existing law and, in the final analysis, concluded that withdrawal liability was an indispensable part of the solution.

C. The Retroactive Application of the Withdrawal Liability Provisions Was Consistent With the Comprehensive Scheme to Protect the Continuing Viability of Multiemployer Plans.

Having become so well-informed regarding the potential impact on multiemployer plan stability of a "rush for the door" psychology on the part of contributing employers, Congress would have been foolish to adopt an arrangement that did not deter employer withdrawals during the lengthy legislative consideration of MPPAA. To have acted otherwise would have been to foster the very result which MPPAA was designed to prevent. Moreover, as we show below, the statute is fully consistent with the due process tests which have been fashioned by this Court.

1. *The Reliance Interest of the Parties.*

It cannot be said that employers who withdrew from plans prior to MPPAA's enactment date were taken by surprise that they would be subject to retroactive liability. As noted by the *Peick* court,

> [w]hen the bill was originally introduced on May 3, 1979, the withdrawal liability rules were effective as of February 27, 1979, the date the PBGC transmitted its initial legislative proposal to Congress. See 126 Cong. Rec. S10156 (daily ed. July 29, 1980) (remarks of Sen. Matsunaga). The February 27, 1979 date remained a part of the bill until June 1980, when the Senate Finance Committee determined that it was an unnecessarily harsh starting point. The Committee shortened the retrospective period by more than a year, advancing the effective date to April 29, 1980, where it now stands.

539 F. Supp. at 1053.

It was no secret to affected employers that the Congress was moving deliberately to enact these legislative changes in federal pension law. As discussed above (at 13-14), the groups representing employers, labor unions and pension plans were deeply involved in MPPAA's development throughout the legislative process. And it was no secret that three of the four Congressional committees which had approved the bill did so with its original February 27, 1979 effective date left intact. *Id.*[17]

Nor are withdrawn employers the sole parties whose reliance interests must be considered here. Plan participants have clear expectations that when they give of their labor to employers contributing to multiemployer plans they will ultimately be entitled to a pension upon retirement. Participant reliance upon retirement income security has been especially heightened since the enactment of ERISA almost a decade ago. Moreover, the employer is not merely obligated to honor its commitments

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[17] Indeed, Senator Matsunaga, a member of the Senate Finance Committee which changed the retroactive effective date to April 19, 1980, expressed the view of many legislators that employers had "ample notice" of MPPAA's retroactivity provisions more than a year before the actual date of enactment. (126 Cong. Rec. S10158 (daily ed., July 29, 1980).

to the collective bargaining agent of its employees; the employer's obligation is also to the multiemployer plan and its trustees, participants and beneficiaries.[18] Thus, the plan and its trustees have a strong reliance interest which must be considered here. So, too, do employers who continue to maintain the plans have a reliance interest.

Accordingly, all of the parties who continue to have interests in preserving the plan must be able to rely on their expectations that the plan will remain financially sound. Congress may act to ensure that the expectations of the greater whole will be protected, even if the consequences may be to modify some of the bargained expectations of the withdrawing employers whose acts have jeopardized the interests of others.

2. *Prior Regulation of the Employers' Obligations to Pension Plans.*

Neither the Court of Appeals below, nor any withdrawn employer who has challenged MPPAA's retroactivity provisions, has suggested that the withdrawal of a contributing employer from a multiemployer plan was not previously regulated under ERISA. The fact is that such employers were subject to liability under former

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[18] Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5), requires that there be a "written agreement with the employer" which specifies the detailed basis upon which payments to a fund are to be made. Thus, plans may enter into direct relationships with an employer even in the absence of a bargaining agreement. In addition, the plan has enforceable rights directly against the employer. These rights were expressly ratified by Congress when, as part of MPPAA, Congress enacted Section 515 of ERISA, 29 U.S.C. § 1145, making employers directly liable to multiemployer plans for the payment of contributions which they are obligated to pay. And, concomitant with the addition of ERISA § 515, Congress strengthened the provisions of ERISA § 502, 29 U.S.C. § 1132, with respect to a multiemployer plan's right to enforce contribution obligations against delinquent employers. *See*, 29 U.S.C. § 1132(g)(2).

ERISA § 4064(b), 29 U.S.C. § 1364(b) (Add. 53.), in the event the plan terminated within five years of withdrawal. *See also*, former ERISA § 4063, 29 U.S.C. § 1363 (requiring "substantial employers" who withdraw from a multiemployer plan to post a bond or pay into escrow the amount of 150 percent of the liability which they would owe to the plan and which amount would be forfeited in the event the plan terminated within 5 years).

The Administration recommended MPPAA and the Congress enacted it for the simple reason that the prior regulatory scheme was not working as it had been designed to. To correct the deficiencies in the earlier law Congress merely strengthened the regulatory framework which it found was not having the desired effect.

Nor, as we have shown, can it be said that employers had reason to expect that this was an area of regulation which was static. MPPAA, including its retroactive effect, had been under consideration and debate in the public press as well as the Congress for almost two years before its final enactment.[19] Moreover, pension plans had been the subject of changing Federal regulation for more than three decades prior to MPPAA. The *Peick* court put it best:

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[19] It was clear to everyone that the original Title IV program was intended to be experimental. The Senate Committees on Human Resources and Finance put it thus in their Report on S.2125 which was enacted (as P.L. 95-214) to delay the implementation of the original multiemployer plan termination program:

> The period of discretionary coverage was created when ERISA was enacted in 1974 due to existing uncertainties regarding the incidence of multiemployer plan terminations and the impact of title IV's provisions on such plans. In essence, the Congress provided a trial period during which insurance benefits could be made available in the discretion of PBGC and during which PBGC, the multiemployer plan community and the Congress could, through observation of experience in the discretionary period, assess the suitability of title IV's provisions as they relate to multiemployer plans.

S. Rep. 95-570, 95th Cong., 1st Sess. (1977).

> [M]ultiemployer plans have been subject to decades of pre-MPPAA federal regulation under Section 165 (now section 401) of the Internal Revenue Code, section 302 of the Labor-Management Relations Act of 1947, and the Welfare and Pension Plans Disclosure Act of 1958. Moreover, and most significant, the 1974 enactment of ERISA demonstrated in the clearest possible way that contractual limitations on withdrawal liability were themselves susceptible to federal displacement. By its terms, ERISA voided all absolute exemptions, and installed in their place a regime of contingent liability. This development alone afforded clear warning that the federal government might one day act again and further buttress the legislative scheme it had created. Nachman never received such explicit warning. . . .

539 F. Supp. 1044-45 (fn. omitted).

3. *The Equities Mandate a Finding of Constitutionality.*

The Congressional Findings and Declaration of Policy of MPPAA, 29 U.S.C. § 1001a (supp. 1981) make clear the underlying objectives of the law to remedy the adverse effects which employer withdrawals have upon multiemployer plans and their participants and beneficiaries. *See*, p. 9, *supra*. Further, when the bill was reported to the full Senate by the Senate Finance Committee, Senator Bentsen, then chairman of the Subcommittee on Private Pension Plans, said:

> The feeling of the Senate Finance Committee was that this bill should not encourage employers to withdraw from a multiemployer plan between now and July 1, 1980. Any withdrawals after April 28, 1980, will be covered by any withdrawal liability rules that the committee might adopt.

126 Cong. Rec. S4302-03 (daily ed.), April 29, 1980.

Certainly, this is clear evidence that the overriding equities were intended to favor the plans, their par-

ticipants and the employers who remained as contributors to plans and who were otherwise faced with the burden of assuming the obligations left behind by withdrawn employers.

Contrary to the view of the Ninth Circuit, imposing retroactive liability is not a basic change in the contractual relationship between the withdrawn employer and its employees. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), this Court found a Minnesota law unconstitutional, which immediately upon enactment reduced the number of years of service necessary for an employee to be vested in a pension. Such an action may well have been "a severe, permanent, and immediate change" in ongoing contractual relationships under the facts of that case. *Id.* at 250. Moreover, the change was the result of the legislative process; no employer action or inaction effected the change. But here, there is no change in the contractual basis for requiring contributions until an employer takes the affirmative act of withdrawing, thereby repudiating its own contractual obligations. It was as a matter of equity for the other affected parties that Congress determined withdrawn employers must assume part of the liabilities which, absent withdrawal, would fall upon the plan, its participants and the remaining contributing employers.

4. ***Certain Provisions of MPPAA Were Designed to Moderate the Impact of Withdrawal Liability, Including the Impact of its Retroactive Application.***

Congress determined that certain provisions of MPPAA, like the limited retroactive application of withdrawal liability, were essential to multiemployer plan stability. However, it also made every reasonable effort to moderate the impact of the rules. In so doing Congress demonstrated its intent to impose liability "only to the extent necessary to achieve the legislative purpose," thus confirming the rationality of its legislative efforts. *Nachman, supra*, 592 F.2d at 962.

In assessing the impact that any given withdrawal will have on a multiemployer plan an important consideration is whether the plan loses a portion of its contribution base as a consequence. A cessation of an employer's participation that does not involve an erosion of that base—because, e.g., another employer has effectively stepped into the withdrawing employer's shoes—is not likely to have a destabilizing effect.

Although there are enormous practical difficulties in crafting statutory rules to distinguish between the effects of various withdrawals, Congress undertook to make this distinction to the extent possible.[20] One result of that effort was the "sale of assets" rule found in 29 U.S.C. § 1384. Under that provision—which has both prospective and retroactive application—a withdrawal is deemed not to have occurred when an employer ceases to contribute as a result of the sale of its business assets to another party, provided that the purchaser assumes the obligation to contribute to the plan for substantially an equivalent number of employees and meets certain other protective conditions.

Congress also concluded that in some industries the nature of employment is such that an employer's cessation of contributions is unlikely to reduce a plan's contribution base. It felt sufficiently confident about two such industries—construction and entertainment—to pro-

[20] The difficulties of formulating statutory provisions that generally distinguish between withdrawals that are harmful to a plan and those that are not are exemplified by 29 U.S.C. § 1383(d). That provision was designed to provide contributors to trucking industry plans an exclusion for withdrawals if "the plan's contribution base does not suffer substantial damage". *See* 126 Cong. Rec. S11671-72 (daily ed., August 26, 1980) (Remarks of Senator Durenberger). Despite the efforts of the legislators to develop a generally applicable statutory test, they could find no alternative but to make the exclusion of any individual withdrawal dependent upon the PBGC, within five years, determining that the plan had not suffered such damage.

vide special statutory rules. In those two industries, Congress found that contributing employers customarily operate on a project-by-project basis; since employees are generally tied to the industry rather than to a particular employer, an employer's cessation of contributions ordinarily does not adversely affect the plan's contribution base. Accordingly, in those two industries the only event defined as a "withdrawal" is the one that Congress concluded is likely to remove a portion of a plan's contribution base—an employer's cessation of contributions accompanied by its continuation or resumption, within the applicable jurisdiction, of the type of work covered by the plan. 29 U.S.C. §§ 1383(b) and (c). Here, too, the rules have retroactive effect.

One of the most significant moderating provisions applicable to both pre- and post-enactment withdrawals—particularly for smaller employers and those whose contacts with a plan have been limited—is the "*de minimis*" exemption. This provision exempts all withdrawal liability amounts under $50,000, and a portion of any amounts between $50,000 and $150,000, thus affecting many withdrawal liability assessments. *See*, *Peick*, *supra*, 539 F. Supp. at 1050. In addition, each plan has the option to adopt a higher *de minimis* rule—exempting amounts under $100,000 and reducing amounts between $100,000 and $250,000. 29 U.S.C. § 1389.

Another important feature applicable to all withdrawals—clearly an improvement on ERISA's original liability rules from the standpoint of the employer—is that MPPAA does not require liability to be paid in a lump sum.[21] The basic rule is that the total amount is

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[21] The original Title IV rule on employer liability—which still applies to single employer plans—requires its payment in a lump sum. While the PBGC has discretionary authority to grant reasonable terms, its implementing regulation states that it will do so only when necessary to avoid the imposition of a severe hardship, and then only when it appears the employer is able to satisfy those terms and pay the entire liability. 29 C.F.R. 2662.8.

to be amortized and paid in installments based on the employer's historic levels of plan contributions. 29 U.S.C. § 1399(c). If more than 20 years are required to amortize such liability on this basis, the payments for the remaining liability are forgiven. In addition to the statutory provisions for amortization of the liability, plan trustees may further adjust the terms of payment pursuant to their broad discretion to "adopt rules providing for other terms and conditions for the satisfaction of an employer's withdrawal liability." 29 U.S.C. § 1404.

Other significant moderating features added by MPPAA include: a special net worth limitation on the liability of an employer which sells substantially all of its assets, 29 U.S.C. § 1405(a); the exemption of certain property of a sole proprietor or partner from the collection of liability, 29 U.S.C. § 1405(c); and two changes that help preserve an employer's ability to obtain credit. One such change gives the plan only the status of a general creditor with respect to withdrawal liability, as contrasted to the tax lien priority the PBGC enjoyed under prior law for termination liability; the other gives the plan general creditor status only as to 50 percent of the withdrawal liability of an insolvent employer undergoing liquidation, 29 U.S.C. § 1405(b).

There are two provisions of MPPAA which specifically were enacted to mitigate the effect of the law's retroactive provisions. One of these provisions states that, in the case of an employer which closed a facility or terminated a collective bargaining agreement under which it was making contributions to a plan prior to the effective date of the statute, contributions and contribution base units attributable to such facility or agreement will be disregarded in the calculation of the employer's withdrawal liability. 29 U.S.C. § 1397. The second provision allows a plan to be amended to permit a reduction or waiver of liability for a withdrawn employer "which resumes covered operations under the plan or renews an

obligation to contribute under the plan." 29 U.S.C. § 1387(b).

Finally in this regard, it is important to recall that Congress moved forward the retroactive application date from February 27, 1979 to April 29, 1980. This action alone had a significant moderating effect since it narrowed the application of withdrawal liability to a smaller group of employers than would have been affected by the bills as originally proposed. It is thus clear that Congress took only the steps it concluded were necessary to accomplish its goals.

D. It Is Well Settled that Retroactvie Legislation Can Withstand Constitutional Challenge.

There is no dispute that statutes having retroactive application can survive a constitutional challenge when it is shown that Congress did not act arbitrarily or irrationally. *Turner Elkhorn* fully supports that proposition and we have demonstrated that MPPAA has fully satisfied the tests which permit this Court to reaffirm its constitutionality. So, too, this Court has upheld laws with retroactive effective dates. *See, e.g., United States v. Darusmont*, 449 U.S. 292 (1981) (per curiam) (minimum tax provisions of Internal Revenue Code amendments applied retroactively); *United States v. Hudson*, 299 U.S. 499 (1937) (federal tax on silver trading applied retroactively); *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934) (state statute to protect homeowners against foreclosure of already executed mortgages does not violate due process).[22] MPPAA's

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[22] An argument may be made to the Court that it is only in tax cases that the courts have upheld retroactive application of a "new liability." Such an approach suggests that the tax laws are *sui generis* since Congress almost invariably revises the tax laws to include a limited retroactive feature and because this Court always

retroactivity provisions lend themselves to similar analysis and should withstand the scrutiny of the Court.

CONCLUSION

For the foregoing reasons, the NCCMP urges this Court to reverse the decision of the Court of Appeals in this case.

Respectfully submitted,

GERALD M. FEDER *
NIK B. EDES
FEDER & EDES
1527 - 18th Street, N.W.
Washington, D.C. 20036
(202) 387-1515
Attorneys for Amicus Curiae National Coordinating Committee for Multiemployer Plans

* (Counsel of Record)

Of Counsel:

ARNOLD & PORTER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

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assumes that taxpayers will receive income even though they know that some portion of it will be taxed.

Such apparent distinctions do not withstand scrutiny. Many tax statutes have the effect and purpose of regulating private conduct in economic and social affairs. Thus, in *First National Bank in Dallas v. United States*, 420 F.2d 725 (Ct.Cl. 1970), *cert. denied*, 398 U.S. 950 (1970), the Court of Claims upheld the retroactive application of an interest equalization tax albeit that the court recognized full well it was "primarily regulatory in nature and imposed upon a voluntary taxpayer act. . . ." *Id.* at 730. The MPPAA withdrawal liability provisions are not dissimilar in effect to certain kinds of tax liabilities imposed by Congress and which have a specific regulatory purpose. As such the retroactive applicability of withdrawal liability can withstand the constitutional challenge here.